"The result is that the duty in question must, I think, be borne out of the corpus of the estate."

When the whole judgment of Maugham J. is read, it is obvious, as the learned judge in the court below stated, that the words "corpus of the estate" mean "that portion of the residue out of which the income was payable." Support for this view can be found in the following passage from the judgment of Lord Mackay in *Betts Brown's Trustees* v. *Whately Smith* (4) at p. 86:

"*In re Northcliffe* is the only other case calling for any observation. ..... The words of the judge are few, and one is not surprised that they were read in what I think to be an erroneous sense. These words were the last sentence, reading as follows: 'The result is that the duty in question must, I think, be borne out of the corpus of the estate.' In applying that to the present case, the supposition was that the corpus spoken about would be the whole residue or at least the whole residual income. But it is perfectly clear from the context that the reporters in their head-note are right when they give the result in these terms: 'And (2) that the duty payable on any such death was a first charge on that portion of the residue out of which the income was payable, and must be borne by the corpus of such estate.' ..... the word 'such' does not appear in the speech as reported, but it is obvious from the context that that was the judge's real conclusion."

Mr. Smith also relied on the following passage from the judgment of Adrian Clark J. in *Re Syed Hashim bin Kassim, deceased* (5) at p. 247:

"Eventually the cumulative effect of successive payments of estate duty as successive lives fall in will be borne by the residuary beneficiaries."

It is clear from the judgment of Adrian Clark J. in that case that in arriving at his decision he was following *Re Northcliffe, supra.* In making the observation which I have just read, it is probable that he had in mind the passage from the judgment of Maugham J. in *Re Northcliffe, supra,* which I have already cited. If this is correct, then it seems to me, with all respect to Adrian Clark J., that he read that passage in an erroneous sense. In my opinion, Mr. Smith cannot derive any assistance either from the passage from the judgment of Maugham J. in *Re Northcliffe, supra,* or the passage from the judgment of Adrian Clark J. in *Re Syed Hashim bin Kassim, deceased, supra.*

Another case relied on by Mr. Smith was *Re Palmer* (6). The facts of that case are different from those in the present case in that it was a case of an annuity which was chargeable upon the whole residue of the testator's estate and it was the whole residue which derived benefit from the cesser of the annuity. In my opinion, *Re Palmer* provides no assistance in the determination of the questions which have arisen in the present case.

As to the argument put forward by Mr. Smith regarding the testator's intention, I cannot find anything in the language of the will which makes it necessary to interfere with the incidence of estate duty payable upon the deaths of income beneficiaries.

In my judgment the learned judge came to a correct decision in answering the questions as he did. The appeal is accordingly dismissed. The costs of the applicants and of the two solicitors who were appointed to represent the two classes of beneficiaries will be paid out of the testator's estate.

Rose C.J. and **Buttrose J.** concurred.

Appeal dismissed.

Solicitors: *Laycock & Ong; L. A. J. Smith; Donaldson & Burkinshaw.*

BANK OF CHINA v. CHEW KEAN KOR

[A. C. J. (Hepworth J.) December 17, 1962]

[Penang — Civil Suit No. 158 of 1962]

Banking — Collection of interest in principal — Whether amounting to "carrying on banking business" — Banking Ordinance, 1958, s.3.

Practice and Procedure — O.14 — Summary judgment under.

The collection of interest in respect of a sum owing to a bank before its winding up does not amount to transacting a banking business within the provisions of section 3 of the Banking Ordinance, 1958.

Cases referred to:—

(1) *Synn Lee & Co. Ltd.* v. *Bank of China* [1961] M.L.J. 87.
(2) *Bank of China* v. *Lee Kee Pin* [1961] M.L.J. 40.
(3) *Re Farm Security Act, 1944* [1947] S.C.R. 394.
(4) *Watkins* v. *Morgan,* 6 C. & P. 661.
(5) *Hudson* v. *Fossett,* 12 L.J.C.P. 141.
(6) *Florence* v. *Jenings,* 26 L.J.C.P. 274.
(7) *Hamilton* v. *Brogden,* 60 L.J. Ch. 88.

APPEAL from the Senior Assistant Registrar in Chambers.

R. K. Sharma for the appellant.

Khoo Keat Siew for the respondents.

Cur. Adv. Vult.

Hepworth J.: This was an appeal from the decision of the Senior Assistant Registrar giving the plaintiffs/respondents leave to sign final judgment under Order 14.

The plaintiffs/respondents were a company incorporated in China and having a branch office at the Bank of China Building at Battery Road, Singapore. The defendant/appellant was a merchant trading under the name of Seng Hock & Co. The defendant/appellant had an account with the plaintiffs/respondents' Penang branch.

The respondents' claim was for money payable by the appellant to the respondents' Penang branch for money lent by the respondents to the appellant and for money paid by the respondents for the appellant as bankers for the appellant at his request and for interest upon money due from the appellant to the respondents. As at 30th April, 1962, the balance of the banking account amounted to $46,832.58.

The appellant admitted the respondents' claim, except as to interest of $30,277.96 charged in respect of the period commencing the 26th January, 1959, being the date on which the Banking Ordinance, 1958, came into force, which sum of $30,277.96 formed part of the respondents' claim of $46,832.58.

It was pleaded by the appellant that this interest was illegal in that in charging interest after the 26th January, 1959, the respondents were carrying on banking business in contravention of section 3 of the Banking Ordinance, 1958, and that the whole of the claim was therefore void and unenforceable.

The appellant did not plead that this interest was not calculated in accordance with the terms agreed between the parties prior to the 26th January, 1959, nor that it had been wrongly assessed (apart from a small sum which is dealt with later) but simply that it was irrecoverable for the reasons just stated.

The principles governing applications for summary judgment under Order 14 are set out in *Synn Lee & Co. Ltd.* v. *Bank of China* [1].

The effect of the Banking Ordinance, 1958, was considered by Rigby J. in the *Bank of China* v. *Lee Kee Pin* [2], the plaintiffs in that case being the same bank as the respondents in the present case. The learned Judge in that case held that in seeking to recover the moneys due to them the plaintiffs were not "transacting a banking business" within the meaning of the prohibition contained in section 3 and within the definition of "banking business" as contained in the Ordinance itself. It was further held that section 5 must be construed as imposing a prohibition on the use of the word "Bank" in relation to a business which is being actually carried on. It cannot be so construed as to place a prohibition upon the plaintiffs suing under the name and title of "The Bank of China" to recover debts allegedly due to them in the course of winding up their business.

The debt arose in the present case before the Ordinance came into effect, it had been agreed by the parties that interest was payable thereon at 80 cents per $100 per mensem, and the appellant had been paying interest at this rate on the amount due prior to the closing of the respondents' Penang branch.

After quoting the definition of "banking business" in the Banking Ordinance, 1958, Rigby J. said in the *Bank of China* v. *Lee Kee Pin*:

> "In my view, in seeking to recover the moneys due to them the plaintiffs were and are not 'transacting a banking business' within the meaning of the prohibition contained in section 3 and within the definition of 'banking business' as contained in the Ordinance itself. As I understand it, the mischief which the Ordinance seeks to avert is to prevent a person or company carrying on banking business in this country without being in possession of the requisite capital paid up in this country. To extend the meaning of the words 'transacting banking business' so as to place a prohibition upon the plaintiffs taking action, in the course of winding up their business, to recover overdrafts allegedly due to them, would be, in my view, to impose upon them an intolerable hardship and injustice not justified by the plain meaning of the words 'banking business' as defined in the Ordinance."

In the Canadian case of *Re Farm Security Act, 1944* [3], Rand J. defined interest, in general terms, as the return or compensation for the use or retention by one person of a sum of money belonging to, in a colloquial sense, or owed to, another. When interest on money is payable by express stipulation or provision it is recoverable as a debt. (*Watkins* v. *Morgan* [4]; *Hudson* v. *Fossett* [5]; *Florence* v. *Jenings* [6]; *Hamilton* v. *Brogden* [7]). I am unable to see how the collection of interest payable in respect of a sum owing in such circumstances can be carrying on banking business any more than the collection of the principal. To hold otherwise would mean that where there had been no stipulation for the payment of interest on a sum owing it would be recoverable whereas if there had been such a stipulation it would not, which cannot represent the intention of the legislature. The appellant therefore had no defence and I accordingly dismissed the appeal with costs.

There was, however, some argument about crediting a payment of $8,000. It was alleged by the appellant that this $8,000 had been paid by him on the 19th December, 1959, but had not been credited until the 26th April, 1960. He had therefore wrongly been charged interest on $8,000 for this period. As it seemed to me to be only fair to give the appellant credit for this amount with effect from the 19th December, 1959, I varied the judgment of the learned Senior Assistant Registrar by reducing the amount of the judgment debt by such amount as represents 80 cents per $100 per mensem on the sum of $8,000 from the 19th December, 1959, to the 26th April, 1960, together with any further consequential reductions which might as a result become necessary.

Appeal dismissed.

Solicitors: *Sharma & Co.; Hogan, Adams & Allan.*